IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.869 OF 2004

Nandkumar Gopal Kulkarni .. .. Petitioner
v/s.
Murlidhar Ganpat Khade. .. .. Respondent

Mr.S.V. Sadavarte for petitioner.

Mr.A.B.Avhad for respondent.

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**CORAM : H.L. GOKHALE,J.**

**DATED : 28th June 2006**

**ORAL JUDGMENT : (Per H.L.Gokhale, J.)**

1. Heard Mr.Sadavarte in support of this petition. Mr.Avhad appears for the respondent.

2. The petitioner has filed a suit for declaration and injunction concerning certain agricultural land. That suit is filed in the Court of the 2nd Joint Civil Judge, Junior Division, Pune. The suit came to be dismissed for default when nobody was present for the petitioner (original plaintiff). This happened on 14th June 2000. The petitioner thereafter moved an application for restoration of the suit under Order IX of the Code of Civil Procedure, 1908. That application was moved immediately within two days i.e. on 16th June 2000. The said Miscellaneous Application, however, came to be dismissed by the trial Court since it did not

accept the explanation of the petitioner's Advocate as to why she was not present. The Judge also has observed that the Advocate concerned should have filed an affidavit or stepped into the witness box. I have seen the application made by the plaintiff for restoration. The application gives the explanation that the Advocate was under the impression that the matter was adjourned to 14th July 2000 and not to 14th June 2000 and that is why she was not present. In any case, what is material to note is that the application is moved within two days i.e. on 16th June 2000. Prima facie, therefore, there is no reason why the learned Judge should not have accepted the explanation of the learned Advocate. There is also no reason why he should have insisted that the Advocate should have stepped into the witness box.

3. Mr.Avhad appearing for the respondent has defended the order but after making the necessary submissions, he has left it to the Court to pass the appropriate orders.

4. For the reasons stated above, in my view, the learned Judge has erred in passing the order of dismissing the application which he has passed on 20th November 2000. The order suffers from

material irregularities in failing to notice that a genuine mistake has occurred in knowing the date of hearing on the part of the Advocate. Not restoring it would result into a serious prejudice to the petitioner (original plaintiff) for no fault of his and also for a genuine mistake on the part of the Advocate concerned. Surely, the mistake could have been rectified by imposing some amount of costs on the petitioner.

5. In the circumstances, the petition is allowed. A notice has been given in this matter on 22nd February 2005 by an earlier Judge stating that the petition may be disposed of at the stage of admission. Accordingly, the impugned order dated 20th November 2000 passed by the 2nd Joint Civil Judge, Junior Division, Pune, in Miscellaneous Application No.516 of 2000 moved by the petitioner, is allowed and Regular Civil Suit No.287 of 1998 will stand restored to the file of the 3rd Joint Civil Judge, Senior Division, Pune. That will, however, be on the payment of costs of Rs.1,500/-. The petitioner will pay the costs to the respondent within two weeks hereafter. The suit may be listed after the costs is received by the respondent for further hearing in view of its restoration.

6. Petition is allowed with costs in the aforesaid terms.

**(H.L. GOKHALE, J.)**